PROHIBITING PLUNDER

HOW NORMS CHANGE

WAYNE SANDHOLTZ

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Prohibiting Plunder: How Norms Change

Wayne Sandholtz

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For Judy, Sarah, and Will

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Acknowledgments

Piecing together the two hundred-year story of rules to protect cultural treasures in wartime brought moments of insight, discovery, and genuine pleasure. The passions behind the work were a love of art, a fascination with the world of diverse countries and peoples, and a growing appreciation of the centrality of norms and rules in social life, including international relations.

Even so, I could not have written the book without inspiration and concrete assistance from many people. My first mentor, Ernie Haas, introduced me to the world of scholarship and always encouraged my explorations in it. Ernie passed away when the project was perhaps half done; I wish he could have seen the finished book. My second mentor, Harry Eckstein, was also my colleague at the University of California, Irvine. He too guided me into the rigors and satisfactions of social science and would, I think, have appreciated this book.

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Wayne Sandholtz
Irvine, California
May 2007

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CHAPTER 1

International Norm Change

During the Thirty Years' War, Swedish armies fought their way across the German states. Gustavus Adolphus, king of Sweden and leader of its forces, upon capturing Munich in 1632, seized the spectacular art collection of the Dukes of Bavaria, including paintings by Dürer, Holbein, and Cranach. Gustavus died in battle later that year, and his daughter Christina continued both the war and the art plunder. She pushed Swedish troops to capture Prague in 1648 to obtain its imperial art collection before treaties brought the fighting to an end. She specifically instructed her cousin, the general Prince Charles Gustavus, to "take good care to send me the library and the works of art that are there: for you know that they are the only things for which I care" (Trevor-Roper 1970, 22–44). In seizing the cultural treasures of their defeated enemies, Gustavus and Christina were not simply brigands with elevated tastes. They were enacting the traditional rule, "to the victor go the spoils."

Three and a half centuries later, in the spring of 2003, U.S. forces surged across Iraq. As they entered Baghdad, local authority—and armed resistance—quickly evaporated. While U.S. troops occupied the Iraqi capital, looters entered the National Museum and carried away thousands of items from its collections, which included priceless artifacts from some of the world's first civilizations. The international outcry was instant, and searing. The critics condemned the United States not for having plundered Iraq's cultural patrimony; U.S. forces had done nothing of the sort. Rather, much of the world rebuked the United States for failing to protect the museum and its treasures. How could the Americans carefully prepare to secure the Oil Ministry but not one of the world's greatest collections of antiquities?

Clearly, standards had changed between 1648 and 2003. For much of history, plunder was the norm; the artistic and cultural patrimony of a defeated foe became the war trophies of the victor. Returning from conquest, Roman generals

literally paraded their booty through the avenues of Rome. Today, however, a set of international legal rules, codified in treaties and charters, forbids such plunder. Modern international courts, including the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia (ICTY), have convicted individual perpetrators of crimes against cultural heritage. I explain the emergence and elaboration of those rules, beginning in Napoleon's Paris and ending in Baghdad in April 2003. The story takes place in episodes, each of which represents a turn through what I call the cycle of norm change.

This book is about the dynamics of change in international norms. International norms evolve as actions trigger disputes about the meaning and application of rules. In short, I offer a general model of international norm change and probe its usefulness by explaining the development of rules that prohibit the wartime plunder of cultural treasures.

My account of the evolution of international rules is in part a response to the common assertion that great powers simply do what they want and make up rules to justify their conduct. Certainly, the most powerful states have the greatest influence in shaping international norms. Yet the power to act in specific ways is not the same as the power to make or modify international rules. A superpower can violate norms and suffer fewer consequences than other states might. But there is a difference between breaking rules and making rules. I argue that even a superpower cannot decree rules to the rest of the international community. Rules are social; they exist by agreement or assent. Normative change depends on much more than the acts of a single powerful state. It depends on the extent to which other states concur in altering the norm and adjust their actions to the new rule.

Thanks to a steadily growing body of research on international norms, many students of international relations (IR) now recognize that the social and normative structure of international relations is as important as its power structure. International social structure consists of rules that constitute actors and institutions and establish standards of conduct for the occupants of various roles. In modern international relations, many of these rules are of a particular kind, namely, legal rules, or laws. A rich body of studies has demonstrated the effects of international norms in virtually every substantive domain, from security, arming, and war, to decolonization, apartheid, and human rights, to the

environment and economic relations.[1] Norms (rules) shape the ways in which actors define their ends (goals and preferences) and choose the means for pursuing them. Norms thus affect outcomes in international relations.[2]

Yet despite the vastly enhanced appreciation of the role of norms in international life, and despite an immense body of international law scholarship, we understand poorly the processes by which international rules change over time. Clearly, international rules are not static. Slavery and colonization were previously accepted features of international society; today international norms prohibit them. War was formerly a matter of sovereign prerogative; today it is circumscribed by rules. Entire bodies of contemporary international law—human rights, environment—did not exist a century ago. Though we know that international norms evolve, our tools for explaining *how* and *why* they change remain inadequate.

I argue that rules in international society often evolve in response to practical problems that incessantly arise out of the gap between general rules and specific actions. Change is an inherent feature of all normative systems as general rules collide with the infinite particularity of social life, and people must argue about how the two should mesh. Because the fit between rules and situations is never perfect, states and other international actors constantly behave in ways that provoke arguments about the meaning and application of the rules. Such debates are an essential feature of international society. The outcomes of these disputes inevitably modify the rules, giving them new content, making them stronger (or weaker), clearer (or less), more specific (or less), more subject to

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1 The following works represent only a sampling of this extensive literature: Barnett and Finnemore (2004); Crawford (2002); Finnemore (1996, 2004); Goertz and Diehl (1992); Jackson (1993); Katzenstein (1996); Klotz (1995); Legro (1995); Mueller (1989); Nadelmann (1990); Price (1997); Ray (1989); Strang (1992, 1996); Thomson (1990); Vincent (1984).

2 Rules are statements that identify standards of conduct; they are the same as norms. The word *norm* and the word *rule* have similar etymological origins. *Norm* derives from the Latin *norma*, "a carpenter's square, a rule, pattern." *Rule* derives from the Latin *regula*, "straight stick, pattern" (*The Random House College Dictionary*, rev. ed., 1988). Unfortunately, *norm* sometimes leads to confusion because it has two common but divergent meanings. On the one hand, norms are standards of conduct (my usage); on the other hand, they are often thought to be generalizations about customary or habitual behavior. The latter sense is clearly not the one I want to invoke. As Giddens notes: "'Rules,' as I understand them, certainly impinge upon numerous aspects of routine practice, but a routine practice is not as such a rule" (Giddens 1984, 19). Generalizations about habitual practice may have normative significance, but they are not norms.

exceptions (or less). The modified rules then establish the context for subsequent rounds of action and disputation.

Norm change thus occurs in cycles, and those cycles are linked backward and forward in time. Earlier cycles provide the normative context and a set of precedents for current disputes. The outcomes of today's disputes help shape the context and the pool of precedents for later cycles. Because of these linkages, analyzing single instances of norm change may be misleading. Sometimes the longer historical view alone can reveal how episodes are connected, each shaped by previous disputes and each shaping subsequent ones. The cyclic process that dynamically links norms, actions, and disputes may not be the only mechanism of rule change, but it is a ubiquitous and important one.

Rules in international relations

As scholars of international relations became more interested in norms, they naturally looked toward international law for ideas. After all, international law is all about norms and their significance. At the same time, students of international law began to look to IR for analytical tools for understanding the empirical processes involved in making and applying international norms. As a result of this budding mutual awareness, scholars in international law and international relations have called for greater intellectual bridge building between the two disciplines (Abbott 1989; Burley 1993; Keohane 1997; Slaughter, Tulumello, and Wood 1998). The flow of ideas, however, seems to have been almost entirely in one direction. International relations concepts and theories have found their way into international law scholarship. But, as Toope notes, "In reading most international relations literature, one looks in vain for the musings of international lawyers – even those who adopted theoretical stances closely allied to methodologies of the other social sciences" (Toope 2000, 91). International law ideas play virtually no important role in IR theorizing. Whereas regime theory and neoliberal institutionalism from IR have influenced international law theorizing, it would be difficult to find a comparable example moving in the opposite direction.

One obstacle to the flow of theoretical ideas from international law to IR is that, whereas international law scholars tend to assume that norms affect outcomes, IR specialists often do not share that assumption. IR scholarship commonly views international norms solely as an outcome. A related tendency in IR is thus to explain the evolution of norms strictly in terms of the goals and choices of actors,

be they governments, international organizations, or transnational activists. Actors choose norms (or institutions) for their utility in reducing transaction and information costs (Keohane 1984). Or, in Krasner's account, self-interest, not norms, drives the behavior of states, and norms are simply "organized hypocrisy" (1999).

Legalization at the international level has also received considerable recent attention. One prominent set of analyses begins with the observation that a "move to law" is underway in some international institutions (Goldstein et al. 2000). These studies note varying degrees of legalization, on a spectrum ranging from soft to hard. Where a specific institution lands on that spectrum is a matter of regime choice or institutional design, in which actors choose the legal form of a regime to reduce transaction and other costs. Norms are outcomes of political decisions, products of the interplay of interests and power. Missing is an attempt to theorize the ways in which normative structures might have their own internal logic or how they change and evolve once established.

An alternative (generally constructivist) account sees norm change as essentially a product of plural politics, in which norm activists seek to rally support for a new rule. Domestic groups favoring the new norm establish coalitions with like-minded groups, sometimes within the same country but, increasingly, with foreign or international nongovernmental organizations (NGOs). These alliances produce transnational activist networks (Keck and Sikkink 1998) that are able to bring pressure on national governments from above (internationally) and below (domestically; Brysk 1993, 2000). The result can be a "spiral" (Risse and Sikkink 1999) or "cascade" (Finnemore and Sikkink 1998) of norm acceptance. The constructivist approach to international norm change has generated useful conceptual tools, including the idea of "tipping points" and the notion of "norm entrepreneurs."

My approach is largely compatible with core constructivist insights. I begin with the premise that social rules guide the conduct of actors but that actors constantly reshape the rules. This premise is another way of stating the central constructivist claim—that actors and social structures are mutually constitutive. My cyclic theory of norm change implicitly includes the idea of tipping points, arguing that a proposed or emergent norm becomes a norm per se once a sufficient number of actors has accepted it as one. And the international law activists I examine in Chapter 4 were, perhaps, the first modern international norm entrepreneurs. Still, the norm spiral and norm cascade theories do not (and their

proponents do not claim to) cover all modes of international norm change. The dynamic model of norm change that I propose moves beyond existing constructivist approaches in several respects.

First, I suggest that episodes involving transnational activist networks and norm cascades should frequently be seen as taking place within cycles of norm change. I argue that norm change occurs in cycles that are linked, forward and backward, in longer historical dynamics. Second, my approach attempts to bridge social construction and instrumental rationality, which proponents of both perspectives too often depict as incompatible alternatives (see Finnemore and Sikkink 1998, 909–910). I show how even the traditional "rational actor" (utility maximizer) is thoroughly enmeshed in social rules and relies on normative reasoning. Third, my framework recognizes, more explicitly than constructivist approaches usually do, the importance of power in altering norms. I distinguish between breaking rules and making rules; the power to "get away with" the former is not the same as the capacity to achieve the latter. A single great power cannot dictate norms, therefore, but agreement among the major states is usually a prerequisite for norm change. Fourth, the core of my theory is not transnational political activism but disputes that arise out of specific actions. Events trigger disputes that end up modifying the norms.

More broadly, approaches that assess international rules only as outcomes are necessarily incomplete (Byers 1999, chap. 2; Hurrell 2000, 329; Kratochwil 2000, 52–54). Actors do modify social rules, but rules also shape the range of strategic and discursive options available to actors. As Kratochwil puts it, "Actors are not only programmed by rules and norms, but they reproduce and change by their practice the normative structures by which they are able to act, share meanings, communicate intentions, criticize claims, and justify choices" (1989, 61). This book develops some of the implications of that under-studied insight. In other words, a theory of international norm change must be dynamic, or dialectic. I borrow from legal theory the notion that legal systems are in a state of constant adaptation, as specific cases lead to clarification of the law, and the insight that disputes are a crucial motor of normative change. I also build on recent developments in IR theory that establish the importance of argumentation and persuasion in international relations (Crawford 2002; Hawkins 2004; Kratochwil 2000; Risse 2000).

Rules and social life

All of what we think of as elemental features of human life—families, communities, work, culture—is social. And social systems are built around an armature of rules (Kratochwil 1989; Onuf 1994, 1998). Indeed, social existence of any kind is impossible without rules. As Kratochwil puts it,

> Human action in general is "rule-governed," which means that–with the exception of pure reflexes or unthinking conditioned behavior– it becomes understandable against the background of norms . . . . Thus, not only must an actor refer to rules and norms when he/she want to make a choice, but the observer, as well, must understand the normative structure underlying the action in order to interpret and appraise choices. (1989)

Rules, and the social and discursive practices associated with them, are at the center of social existence and hence at the core of politics (Kratochwil 1989; Onuf 1996; Stone Sweet 1999). Rules define the various roles in a society as well as the bounds of appropriate action (rights and duties) that attach to those roles. When people interact in anything other than the most transitory, unrepeated ways, they inevitably develop rules to guide their dealings with each other. In Onuf's words, "When [people] confront the necessity of dealing with each other without knowing if they follow the same rules, they learn what they commonly know and make what other rules they need" (1996, 9). Rules are the material of social structures, from the family to international relations. Indeed, the English School explicitly treats international relations in terms of international society (Bull 1995 [1977]; Buzan 1993; Dunne 1998; Watson 1992). Hedley Bull posited that international relations occur within a society of states, which shared institutions and rules define (1995 [1977]).

Rules are statements that identify standards of conduct.[3] Rules and norms are the same thing; I use the terms interchangeably. Rules vary on three principal dimensions: they can be more or less formal, more or less specific, and more or less authoritative (Stone Sweet, Fligstein, and Sandholtz 2001, 6–7). Formal rules are generally produced by organized rule-making procedures and take written form.

[3] In Onuf 's (n.d., 17) more extended definition, rules are statements that "address some class of agents, describe some class of actions as appropriate for those agents, and link agents and standards with ought-statements: agents ought to behave in accordance with standards."

Specificity has to do with whether rules provide broad principles or guidelines ("Drive safely") as opposed to narrowly focused requirements ("Do not exceed 65 miles per hour"). Authoritativeness refers to the extent to which the relevant social group thinks the rules are compulsory (violations requiring punishment) or advisory (establishing desirable behaviors but eliciting little in the way of sanctions). More authoritative rules often have organizational supports (agents empowered to monitor compliance, adjudicate disputes, and mete out punishment; Raz 1975).[4] A regular lunch group, for instance, is likely to have informal rules that are somewhat specific (what time to meet, who pays), with a low level of authoritativeness and no organizational supports (transgressions might elicit a shrug or some good-natured ribbing).

The notion that rules vary along three dimensions suggests that there are degrees of "ruleness." We could, in principle, situate all norms along a continuum (see fig. 1.1). At the left end of the continuum, norms are informal, nonspecific, and nonauthoritative ("in professional settings, shake hands when meeting someone"). At the right end, norms show a high degree of formality, specificity, and authoritativeness ("the speed limit in school zones is 25 miles per hour, with violations punishable by fines"). Legal rules, or laws, cluster at the right end of the spectrum. Indeed, a full measure of all three properties sets legal rules apart from other kinds of rules, though at this point traditional legal theory runs into problems. The dominant positivist tradition in legal theory tends to see the properties of norms in binary terms: either they are present, or not; a norm is either a legal norm, or not. Such decisive distinctions are essential, of course, in the practical work of lawyers—they must be able to identify legal rules.[5] No legal consequences can attach to violation of (or compliance with) a norm that is not also a law. In domestic legal systems, identifying the laws is usually straightforward. But in international law, it is not always clear whether a particular norm is a legal norm, entailing legal rights and obligations, or not. Customary international law (CIL) is a bottomless mine of such problems because CIL norms are, by definition, informal (not codified in treaties). Thus the problem of identifying customary international law (consistent practice of states and *opinio juris*) is a virtually permanent live topic for international legal scholars.

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4 Organizational supports are themselves created and defined by rules and, therefore, do not constitute an additional attribute of rules themselves.

5 Thus legal systems include rules of recognition that allow practitioners to identify laws (Hart 1994).

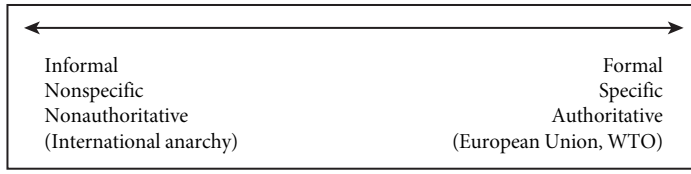

Fig. 1.1. The continuum of rule properties

In this study, my primary interest is in how informal rules first emerge and how they develop over time greater degrees of formality, specificity, and authoritativeness. The historical account will, in fact, demonstrate that through a succession of cycles, rules prohibiting the wartime plundering of cultural treasures moved along the continuum from informal to formal (becoming codified in conventions), from general to specific (culminating in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict), and from nonbinding to moderately authoritative (being enforced against individual violators in international tribunals). By the end of the narrative, there is no question that antiplunder norms have achieved the status of law. However, the book will not attempt to specify when those norms became legal norms nor will it discuss these developments in the language of sources of international law. The movement along the continuum of rule properties toward the legal pole is what matters; identifying the moment at which a rule of customary international law emerged is not.

The continuum of rule properties is also intelligible in terms of the traditional concerns of international relations. At the left extreme we find the "anarchy" of traditional international relations, where rules are few, imprecise, and seldom authoritative. Moving to the right, we encounter international institutions whose rules are more formal, precise, and authoritative, including legislative and judicial organizations.[6] Highly developed international legal rules and institutions exist, for example, in the European Union and the World Trade Organization (Stone Sweet 2002b).

The Cycle of normative change

International law, of course, has well-established rules for adding to or changing the stock of international legal norms: the sources of international law. New rules emerge and existing rules evolve through the formal process of treaty creation as well as through the development of customary law. Domestic laws

[6] Alec Stone Sweet offered such a continuum of international institutions, incorporating the dimensions of formality, specificity, and authoritativeness Stone (1994). The research project on legalization in world politics subsequently adopted an essentially similar conception (Goldstein et al., 2000).

that can be found in all or nearly all national legal systems can also indicate the existence of an international legal rule (general principles of law). Judicial decisions and scholarly treatises also provide evidence as to the existence of an international legal norm.[7] The traditional international law concern with sources is grounded in the need to identify rules of international law; my concern is somewhat different. I am interested in how informal international norms first emerge and then develop, over time, greater degrees of formality, specificity, and authoritativeness. Thus, though much of the empirical account deals with what international lawyers recognize as the formation of customary international law and the making of treaties, I do not focus on the formal legal status, at each stage in the story, of the norms in question. My concern is not to measure specific norms against the technical standards for sources of international law but rather to explain how international norms (formal or informal, legal or not) change.

Normative change is continual, a product of the constant interplay between rules and behavior. In every social system, the evolution of norms follows a cyclical, or dialectical, pattern. I do not claim that this dynamic is the only mechanism of normative change, but I do argue that it is a fundamental feature of all normative systems, domestic and international, centralized and decentralized. In this section, I briefly describe, in schematic fashion, the cycle of normative change; subsequent sections examine in more detail each phase of the cycle.

The cycle begins with the constellation of existing rules, which provide the normative structure within which actors choose what to do, decide how to justify their acts, and evaluate the behavior of others. Because rules cannot cover every contingency, and because conflicts among rules are commonplace, actions regularly trigger disputes. Actors argue about which norms apply and what the norms require or permit. The outcome of such arguments is always to modify the norms under dispute, making them stronger or weaker, more specific (or less), broader or narrower. In other words, rules may change in their substantive content (which acts are prohibited, permitted, or required), but they can also change along other dimensions (formality, specificity, and authoritativeness). Of course, weakening rules is also a form of change. The absence of consensus, or the proliferation of qualifications and exceptions, can both indicate that a rule is becoming weakened or ambiguous. The crucial point, however, is that the cycle of normative change has completed a turn and modified the norms underlying the dispute.

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7 See the Statute of the International Court of Justice, Art. 38 (International Court of Justice, 2007).

The altered norms establish the context for subsequent actions, disputes, and discourses (see fig. 1.2).[8]

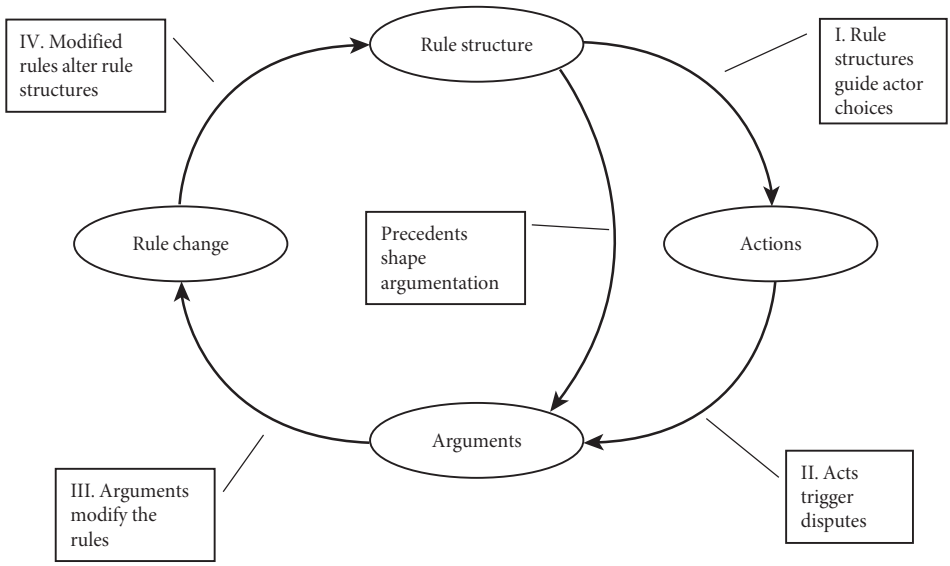

Fig. 1.2. The cycle of norm change

Phase I: Rules and the context of choice

For the sake of argument, I begin with a rational maximizer who estimates the payoffs from alternative courses of action (within cognitive and resource limits) and chooses the option that generates the greatest utility (however the chooser defines it).[9] But whereas the traditional rational actor is an essentially autonomous calculator, I place her at the outset in a normative context. To estimate expected payoffs, the rational actor must engage in reasoning about social norms.

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8 Of course I am not the first to depict the relations among rules, practices, and discourses as a cycle; see Giddens (1979) and Dessler (1989). My conception of the cycle is similar to that of Stone Sweet (1999); but whereas Sweet's framework includes a third-party dispute resolver (and ties the construction of governance to the emergence of triadic dispute resolution), my framework excludes the dispute resolver and focuses on decentralized social persuasion as a mechanism of rule change.

9 Utility maximizing is not the only form of human rationality. There is no a priori scientific reason to privilege it over other forms of rationality. There is, however, a practical reason: utility-based rationality offers the convenience of lending itself to mathematical and quantitative techniques.

Indeed, normative reasoning comes before utility calculations, and arguing about rules is an unavoidable part of pursuing valued ends. Again, for the sake of argument, I assume that actors are strategic; when engaged in a dispute, they will call upon whatever norms and offer whatever arguments are likely to maximize the achievement of self-regarding interests. The point is to show that social norms constrain even such strategic, insincere actors in their actions and arguments. The arguments hold with even more force if one assumes that actors, through socialization, internalize norms, which then shape their preferences and objectives.

Because the maximizer is strategic, she attempts to foresee the costs and benefits of various courses of action, given limits that time, resources, and cognitive capacity impose. Her anticipatory calculation focuses on how other actors are likely to react to her choices. Therefore, rational actors must anticipate which actions would be deemed (by other relevant actors) compatible with the rules and which would not, because, of course, various sanctions are likely to attach to acts judged incompatible with group norms.[10] To make such determinations, the actor must understand not only the society's rules but also its current standards for interpreting and applying the rules. She must assess which justifying arguments tend to be successful, and which previous cases (precedents) carry persuasive force.[11] Normative reasoning, then, shapes her choice of action.

As a consequence, people routinely and constantly engage in normative reasoning. We observe people reasoning and talking about rules in every kind of social context, from families, to circles of friends, to workplaces, volunteer groups, clubs, and the editorial pages—not to mention the courts. Children seem to develop the capacity to reason and argue normatively at a remarkably young age, demonstrating early on an ability to assert vigorous claims about what is fair or unfair. Indeed, writers from Aristotle to the present have posited that the ability to reason about rules is inherently human (Aristotle 1988, bk. I; Kratochwil 1989; Onuf 1998).

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10 My account is at least partially compatible with Gary Becker's (1968) economic model of crime and punishment, which has its roots in the utilitarian approach of Bentham. According to Becker, someone contemplating a potential violation of rules estimates the costs and benefits of the infraction. Essential to this calculation are the probability of conviction and the severity of the punishment. Estimating the probability of conviction requires the kind of anticipatory normative reasoning I have described.

11 For many specialized areas of the law, ordinary citizens do not possess the normative expertise they need, so they hire attorneys. But in less formalized and centralized social settings, actors engage in this kind of reasoning on their own. We do it routinely every day. At work, do the norms of my group require that I raise concerns in an open meeting or in private with the group leader? Or, in the family, what are the acceptable justifications for staying home from school?

It seems likely that the capacity to reason about rules in complex ways, including situations of normative ambiguity and conflict, is as innately human as the "language instinct."[12] Sugden (1989, 89, 95) points out that "ordinary people with limited rationality" find little difficulty in solving coordination problems that the fully rational players in game theory find intractable, and suggests that the ability to work with norms is innate, even biological. It may well be, then, that there exist two major logics of action (or "microfoundations"), one based on maximizing utility and the other based on reasoning by analogy to determine the appropriateness or "fit" of actions with norms. The two modes are almost certainly complementary (Sandholtz and Stone Sweet, 2004; Stone Sweet, Fligstein, and Sandholtz, 2001).

Phase II: All normative structures generate disputes

Though rule structures establish contexts for individual choice, they also, and inevitably, generate disputes about specific choices. Two important features of rule systems guarantee a constant stream of disputes: incompleteness and internal contradictions.

No system of rules can be complete, in the sense that rules cannot spell out the behavioral requirements for every situation, nor can they foresee all possible circumstances or disagreements. Some acts may constitute clear violations of a norm, but other acts will not be easy to assess; they will be arguable, which is exactly the point. The classic statement of the problem is H. L. A. Hart's: "Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture'"(Hart 1994, 123). Or, in MacCormick's words, "Almost any rule can prove to be ambiguous or unclear in relation to some disputed or disputable context of litigation" (MacCormick 1978, 65– 66). In international relations, events routinely fall within the zone of ambiguity where the rules cannot be applied in a straightforward, mechanistic way.

Internal contradictions also generate disputes. Because there are multiple rule structures in any given society, tensions and contradictions between different rules are commonplace (Kratochwil 1989, 62, 190; Lowe 2000, 213–214; Schachter 1991, 20–21). Some actions can, therefore, evoke different rules, entailing divergent

[12] The phrase borrows the title of a superb book by Steven Pinker (1994).

requirements (Kratochwil 2000, 48). For instance, the right of free speech sometimes clashes with the right to be protected from slander and libel. Rules to protect dolphins have been in tension with rules of free trade. In international relations, actions commonly evoke different sets of rules, which are then seen to be in tension (e.g., nonintervention *vs*. protection of human rights).

Gaps and contradictions in the rules are, then, inevitable. But normative change does not occur as a process of abstract reflection. Rather, specific acts reveal the gaps and contradictions.

Phase III: Arguments

Sooner or later, despite her best efforts at anticipatory normative reasoning, the maximizer does something that triggers opposition. She finds herself embroiled in a dispute, and winning the dispute would provide a better payoff than losing. To win, she must persuade other relevant actors that her conduct complies with the group's rules and, therefore, should not be sanctioned.[13] She must offer the most convincing arguments possible that her position in the current dispute best fits what the rules require and best conforms to the ways in which previous disputes were resolved (precedents). In other words, even the selfish maximizer has strong incentives to offer normative arguments, and normative arguments require, as Elster points out, a certain degree of impartiality. Actors try to find impartial arguments as close as possible to their self-interests. But arguments too close to self-interest are suspect. There must therefore be some distance between the self-interest and the impartial argument. Actors, accordingly, argue rather than simply assert a self-interest and demand assent; arguments persuasive to third parties (not directly involved in the dispute) are especially valuable (Elster 1995, 246–47).

The determination of which arguments are likely to prevail depends on analogical reasoning, which involves shared standards of fit, similarity, and relevance. At this moment, the maximizer has entered the world of normative discourse, where payoffs depend on making persuasive arguments fitting situations to norms and precedents.

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[13] The audience that must be persuaded varies according to the context. In a legalized setting, the audience is the judge or a jury. In less formal contexts, like a dinner group, the audience is a nonhierarchical set of peers. International relations usually resemble the less formal setting in which actors must persuade their peers.

Consistency, analogy, and precedent

Legal scholars recognize analogical reasoning, and the logic of fit, as central to legal systems and to the development of law (Hart 1994, chap. 7; MacCormick 1978, chap. 7; Murray 1982; Sunstein 1993, 1996). In systems of law, litigants as well as judges must constantly justify their claims and conclusions by drawing analogies between the case before them and past cases (precedent). Much legal argumentation, therefore, has to do with invoking persuasive analogies, establishing significant parallels between salient features of the case at hand and those of earlier cases. Arguing by analogy and precedent, I argue, is a feature of all normative systems, not just legalized ones.[14] In fact, some cognitive psychologists conclude that the ability to construct analogies is a fundamental part of thinking.[15]

Disputants—even when driven by purely selfish motives—must argue within the bounds established by precedent, because those who decide cases have powerful incentives to decide them according to precedent. Judges face a constant "crisis of legitimacy": parties will be less inclined to abide by judicial decisions to the extent that they appear arbitrary or inconsistent. Following precedent defuses this crisis of legitimacy (Shapiro 1972, 1981; Stone Sweet 1999) by showing that like cases are judged alike (MacCormick 1978, chap. 4), that judgments are not simple predilections or random events. The urge for consistency and legitimacy is so powerful that even in legal systems that explicitly reject the doctrine of binding precedent (*stare decisis*), judges tend to cite previous decisions to justify their rulings, and lawyers begin to cite precedents in their briefs. If cases were not resolved so as to fit with the norms established by previous outcomes, law would cease to serve any purpose. As D'Amato explains, "If no discernible, articulated, intelligible pattern of judicial law-making resulted from the activities of judges, people would not be able to order their lives in a reasonable, stable manner. More than that, vast chaos would ensue as soon as a number of people realized the potentiality for personal gain in such an arbitrary system." Indeed, D'Amato concludes, " 'law' in the sense of verbal norms affecting human behavior would cease to exist" (1971, 176).

A similar logic applies to international norms and disputes. As Alvarez notes with respect to the arguments over NATO's intervention in Kosovo,

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14 Consistency, analogy, and precedent undergird not just the formal sources of law but also systems of law as such.

15 For a review of this literature and its relevance to the study of legal systems, see Stone Sweet (2002a).

> Even the United States understands that the legitimacy of its arguments about the legality of NATO's action [in Kosovo] will depend on whether these arguments will reflect shared understandings and expectations—and not merely of other governments, but also by the legal appraisals of other IOs, academics, NGOs, and other organs of public opinion. And, because of the intersubjective nature of these arguments, as well as, more precisely, the law's needs for consistency and coherency, even the United States understands that whatever it argues about the legality of NATO action will necessarily have to apply to other communal responses that are deemed comparable in the future. (2001, 135).

More generally, argumentation "is constrained by the need to remain faithful to its accepted process and sources of authority; that is, to maintain its credibility before its intended addressees" (Alvarez 2001, 135). Precedents provide actors with evidence of what behaviors states have accepted (or condemned) in the past. Decision makers therefore examine precedents and establish analogies with current situations. Put differently, examining precedent helps actors to form expectations about how others are likely to react to their conduct.

Because consistency is so fundamental to all normative systems, parties on both sides of a dispute will marshal whatever precedents they can (D'Amato 1971, 91). The actor who can offer several pertinent precedents consistent with her interpretation of the current dispute will generally be more persuasive than the actor who cannot cite relevant precedents (Byers 1999, 159). The position unsupported by precedent can prevail, but when it does, other persuasive reasons must support it (powerful ethical values, for instance; see Crawford [2002]). In international society, even a small number of precedents can be crucial in establishing a norm. A disputant acting contrary to existing precedents will find it much harder to persuade others that her actions are justified (D'Amato 1971, 91–98).

The notion of persuasiveness implies an audience that weighs the arguments and reaches conclusions. At the international level, judges are not usually the key dispute resolvers (except in substantially judicialized settings like the WTO dispute panels, the European Court of Justice, and a few other fora). Rather, disputants seek to persuade other members of international society that their understandings of the rules and of the disputed acts are the most appropriate, given how the community has reacted to similar situations in the past. Whereas in a domestic court the litigants aim to persuade a judge or jury, in decentralized international society the parties to a dispute seek to persuade other states that have, or think

they have, a stake in the matter at issue or in the norms being contested. International disputants must persuade what amounts to a jury of their peers. This conception is similar to one McDougal offers: international rule making is a process of

> continuous demand and response in which the decision-makers of particular nation-states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. (1955, 356–57)

State officials will argue in fully self-interested ways and will draw selectively and strategically on rules and precedents that support their goals. But, as Schachter points out, the representative of a state "is able to do this successfully only to the extent that his positions are accepted (at least acquiesced in) by other States concerned" (1991, 23).

Consistency is indispensable to the functioning of systems of rules. This is as true of the decentralized, horizontal system of international relations as it is of a full-fledged system of law (Alvarez 2001, 135).

Power, norms, and international relations

International relations, it is commonly assumed, are different. Power presumably overrides rules and arguments. Let us accept for the moment the typical characterization of international relations as minimally rule-structured, leaving aside the expanding islands of transnational rule making and dispute resolution. Let us also accept for the moment the simplifying assumption that in anarchic international relations, states are the principal actors. The question is, Does normative argumentation, guided by past cases, take place even in the lightly rule-structured domain of anarchic international relations? A growing body of research indicates that it does (Crawford 2002; Hawkins 2004; Risse 2000). Of course, normative argumentation in world politics differs from that in other settings.

Anarchic international relations imply a different kind of politics, one in which power is less mediated by institutions (see Krasner 1999). Naturally, the more

powerful an actor is, the more it will be able to bear the costs of transgressing rules. The same could be said of domestic judicial systems. Lawyers who fall asleep in court are a problem for destitute defendants, not for wealthy executives and famous athletes. But it is a mistake to assume that violating international norms carries no costs for powerful actors. Those costs can include reciprocal noncompliance, retaliation, reputation loss, domestic criticism, or even court sanction. As Schachter points out, "violations . . . are rarely cost-free even to powerful states," though they are better able than others to absorb the costs of rule breaking (1991, 7–8).

The 2003 U.S. invasion of Iraq provides a telling illustration. U.S. arguments that the invasion was justified failed to persuade most states. Neither the Security Council nor the broader international community was convinced that the invasion of Iraq was permitted by earlier Security Council resolutions or by the rules governing anticipatory self-defense. In much of the world, then, the invasion was viewed as a violation of international law. When U.N. Secretary General Kofi Annan labeled the war in Iraq "illegal" (he had previously termed it "not in conformity" with the UN Charter), he was voicing a widely shared assessment ("The Primacy of International Law" 2004; Tyler 2004).

The perception that the U.S. invasion of Iraq contravened international rules imposed significant costs on the United States. The war in Iraq has so far cost the United States over 3,000 lives and hundreds of billions of dollars. The widespread view that the 2003 war in Iraq was illegal also meant that fewer countries (as compared with the 1991 Persian Gulf War) contributed military forces to the effort. The United States has born the burden of troop and hardware commitments that have markedly reduced the capacity of the U.S. military to respond to other threats or undertake other missions (Mazzetti 2005). In contrast, the U.S.-led military effort that ousted Iraqi forces from Kuwait in 1991 was on solid normative ground, and the United States received Security Council authorization to use force. Monetary contributions from other countries (notably Japan and Saudi Arabia) fully covered the costs of the massive U.S. involvement in that war. Therefore, even the most powerful country in the world pays the costs when its actions are seen as violating international rules.

The key point, though, is that violation of an international rule by a powerful state does not in itself change the rule. Put differently, the claim that powerful actors in international relations can often avoid sanctions for noncompliance with international rules is not equivalent to the claim that great powers are thereby

rewriting the rules. Breaking the rules is not the same thing as making the rules. The effect of a violation depends crucially on the justifications offered by the violator and the reactions of other states. One study of instances of U.S. noncompliance with international rules concluded that other states, and international organizations, "became involved in each case and the impact on international law of US noncompliance has therefore generally been indirect" (Scott 2003, 449).

If the violating state justifies its conduct as a permissible exception to a general rule, the effect is generally to strengthen the norm. As the International Court of Justice explained in its decision in the *Nicaragua* case, if a state breaks a rule of customary international law but "defends its conduct by appealing to exceptions or justification contained within the rule itself, whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule" (1986, 98, para. 186). Similarly, the reactions of other states are crucial in determining the consequences of a violation for the development of international norms. A major state may transgress an international norm and suffer few immediate penalties. But its apparent impunity does not necessarily imply a shift in the rules. On the contrary: if most other states condemn the great power's conduct, its violation remains simply a violation, and the rule is affirmed.

In the longer term, violations of international norms can lead to new or modified rules if other conditions are met. If an apparent violation provokes only mild or pro forma condemnation, that is evidence that the rule itself is weakening and possibly undergoing change. If, in addition, an apparent violation is followed in subsequent years by similar behavior on the part of other states, then the new pattern of conduct can be evidence of an emerging norm. In that case, the initial noncompliant act would be seen as not just a violation but as the first step in defining a new rule. Of course, such judgments can only be made in retrospect. To return to the Iraq war example, if international criticism of the 2003 U.S. invasion were more muted and if, over the next ten or twenty years, additional countries carried out preventive attacks and justified them in terms of a new rule of permissible preventive self-defense, then the U.S. invasion would be seen as initiating a process of rule change.

Even in the most lopsided international distribution of power, with one superpower or "hyperpower," the one great power might be able to compel specific outcomes, but it cannot necessarily dictate norms. By itself, the United States can neither create new norms nor prevent them from emerging (Toope 2003, 313).

Despite its unprecedented hegemony in the international system, the "incredible power of the United States will not be enough to enable it to 'go it alone' in international rule making" (Kwakwa 2003, 26). For instance, the United States, in its "unipolar moment," has by no means been able to impose its preferred norms on the rest of the world in trade, in humanitarian intervention, or in combating international terrorism. Not even superpowers can always rely on superior power and compulsion; even they must employ persuasion, seeking to establish consensus among multiple interested parties. In any case, unipolar systems are exceptionally rare, and never absolute. Britain, at the height of is ascendance, did not dictate the terms of the nineteenth-century Pax Britannica; it negotiated those rules with the continental European powers (McKeown 1986). The dynamic of normative evolution is not simply reducible to the exercise of power.

Great powers cannot generally, by themselves, decree changes in international norms. They, too, must persuade other powers, large and small, to support changes in existing norms. That said, support from powerful states increases the chances that norm modifications will be accepted. The concurrence of multiple powerful states thus increases the likelihood of normative change, especially when the agreement among great powers crosses over other great-power differences.

Phase IV: Rule change

The outcomes of arguments modify the rules. The rule may become more clear or less, more specific or less, more qualified by exceptions or less, but it cannot remain unchanged. Broad agreement among states, in favor of one side or the other, strengthens the norm being asserted by the prevailing side. Absence of consensus leaves the norms in question subject to continuing contestation (Byers 1999, 154, 158). Of course, many international norm arguments take decades or even centuries to be resolved. Some debates fade away with no clear outcome, only to be revived in a later period. The long duration and the on-and-off nature of many international norm debates affirm the necessity, in many instances, of taking the long historical view. Arguments that are inconclusive in the short term may be part of more consequential long-term processes.

At a minimum, each dispute adds to the pool of precedents. In international society, a small number of precedents can be crucial in establishing a norm. A sole precedent can be contradicted by a single subsequent contrary outcome. With two or three or more precedents, the weight of the emerging norm increases. A disputant acting in accord with the line of precedents can be more confident

that other actors will accept her action as legitimate. A disputant acting contrary to existing precedents will find it much harder to persuade others that her actions are justified (D'Amato 1971, 91–98).

Finally, to the extent that powerful actors internalize rules, their values, goals, and choices are shaped from within by normative structures that have been "domesticated." When international rules alter the terms of domestic policy debates, get incorporated into domestic legislation, affect the decisions of domestic judges, and become integrated in the organizational cultures and routines of domestic bureaucracies, then international rules have been absorbed into a country's own practices and institutions (Cortell and Davis 1996, 2000; Koh 1998). Even superpowers internalize international norms.

Winning arguments

The argument so far holds that actions in international relations constantly provoke disputes about the meaning and application of international norms. Actors favoring differing interpretations of the rules offer arguments designed to persuade others. Which arguments are likely to prevail? Certain features of the dispute context and of the arguments being offered increase the likelihood that a specific position will be more persuasive than its rivals. These factors fall into three categories: power, foundational norms, and precedents.

1. Power: Great powers may not be able unilaterally to create or change international norms, but acceptance by most of the world's leading powers is necessary for norm change. Assent by multiple great powers increases the likelihood that a new (or newly modified) norm will take root. Norms that win consensus across great-power divides (e.g., U.S.-Soviet agreement during the Cold War) are especially likely to become established. The major powers can often offer various incentives (carrots and sticks) to gain the consent of smaller states.

2. Foundational metanorms of international society: A number of scholars have noted that certain international norms are so fundamental that they underpin a huge variety of other rules. These foundational norms are at the core of the liberal Western tradition, which is becoming increasingly globalized. To the extent that these liberal metanorms are globalizing, arguments that are grounded in one or more of them

are difficult to oppose, and therefore carry persuasive weight. Key foundational norms include:

- *Universality*: international rules should apply universally, across cultures, nations, religions, and so on (Boli and Thomas 1998; Meyer, Boli, and Thomas 1987).

- *Equality*: all persons should enjoy the same rights and protections (Keck and Sikkink 1998).

- *Individual dignity*: a notion of the inherent dignity of each person undergirds a broad range of norms against behaviors that would be degrading to the individual. Rules to ensure bodily integrity and the prevention of harm (Keck and Sikkink 1998)—including norms against slavery, torture, cruel treatment, and sexual exploitation, for example—are grounded in a basic norm of the dignity of every person.

The foregoing metanorms frequently clash with two other metanorms that are the foundation of the international legal order: sovereignty and nonintervention (which, of course, were also products of the liberal tradition). Many of the most important international normative debates of the last several decades arise out of the conflict between claims based on equality and individual dignity, on the one hand, and sovereignty and nonintervention on the other. For instance, can states intervene to halt massive human rights abuses in other states, or are domestic relations between governments and their own citizens shielded from outside intervention by sovereignty norms? As argued earlier, tensions between coexisting norms are a constant source of the disputes that drive normative change.

3. Precedents: arguments are stronger when they can reference similar instances in which the norm being asserted was similarly applied. The idea is not that precedent is binding in international relations. Rather, as argued earlier, there is a powerful inclination for participants in normative systems to seek consistency; without consistency, rules do not fulfill their function of providing for stable expectations. Arguments based on analogous cases thus draw strength from the value attached to consistency. Two dimensions of precedent are important:

   - *Number*: A single precedent provides some minimum level of support to an argument, but just one contrary example can offset a

single precedent. Two consistent precedents are therefore substantially more persuasive than one, and three are more persuasive than two. In general, the larger the number of consistent precedents, the stronger the argument (D'Amato 1971, 88–91).

- *Closeness in time*: Recent precedents tend to carry more argumentative weight than historically remote ones. The more distant in time a precedent is, the less likely it will appear analogous to current disputes, given the changes in social values and political systems that time inevitably produces. In contemporary debates, the Persian Gulf War is much more likely to be a source of persuasive precedents than are the Peloponnesian Wars.

To sum up, arguments lead to normative change, whether existing norms are reinforced or new norms emerge. Sometimes specific debates do not produce winners; arguments are inconclusive or suspended at one stage and resumed later. Furthermore, change in the substantive content of rules is only one form of change; norms can also shift along other dimensions, including strength, formality, specificity, and authoritativeness. Thus, rules are changing when they become stronger (or weaker), more (or less) specific, more (or less) formal, and more (or less) binding. Normative systems are thus in constant evolution, as a product of arguments triggered by disputes. Arguments are more likely to prevail to the extent that they: (a) are supported by multiple great powers; (b) are consistent with foundational metanorms (universality, equality, individual dignity); and (c) are supported by multiple, recent precedents. At this point, the cycle has completed one turn. The modified rules establish the context for subsequent choices of action and the precedents available in subsequent disputes.

Applying the model

I have suggested that the dynamic model just described represents a regular pattern of international norm change. It is not the only way in which international rules evolve, but it is an important and ubiquitous one. In the chapters that follow, I offer an account of the evolution of international rules against wartime art plunder, covering more than 200 years. The history of norms against plunder includes several turns through the norm cycle, and can thus demonstrate the plausibility and utility of the theoretical argument. Wartime plunder offers a rich lode of events and debates, a vein of history running through all of the most convulsive conflicts of the last two centuries, from Napoleon's Paris to Baghdad in 2003.